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No. 09-1314

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

DANNY LEE JONES,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF

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CAPITAL CASE ARGUMENTS

Petitioner relies on the Questions Presented, Statement of Jurisdiction, and renditions of the Opinion Below and Constitutional Provisions at issue as set forth in the Petition for Writ of Certiorari and, without repeating arguments made in the Petition for Certiorari, hereby briefly responds to Jones's arguments in his Brief in Opposition.

I

THE NINTH CIRCUIT IMPROPERLY EXTENDED THIS COURT'S OPINION IN *AKE V. OKLAHOMA* TO INCLUDE A REQUIREMENT THAT DEFENSE COUSEL EMPLOY A PARTISAN EXPERT, AND THEN APPLIED THAT UNAUTHORIZED EXPANSION TO DETERMINE WHETHER JONES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

A. *EN BANC* REVIEW IS NOT REQUIRED FOR THIS COURT TO REVIEW THE NINTH CIRCUIT'S OPINION EXTENDING *AKE V. OKLAHOMA* TO MANDATE USE OF A PARTISAN EXPERT IN A CAPITAL CASE.

Jones asserts that this Court may not review the Ninth Circuit's interpretation of this Court's case law because the issue has been waived by virtue of a perceived lack of thorough *en banc* review. (Brief in Opposition, at 6-8.) However, Jones ignores this Court's rules. The Rules of the Supreme Court of the United States provide this Court with the discretion to grant review on a writ of certiorari where "a United States court of

appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10 (a) and (c), R. S.C. of U.S.

Jones cites *Bivens v. Six Unknown Named Agents Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971), in support of his assertion, however, *Bivens* is inapposite. In *Bivens*, this Court refused to consider an issue regarding the availability of public immunity because the court of appeals had not "passed" on the district court's ruling on that issue. Unlike *Bivens*, the Ninth Circuit in this case clearly "passed" on the issue of extending the requirements of this Court's decision in *Ake*, as it forms a large part of the analysis in its published opinion invalidating a legitimate state court sentencing procedure and resulting sentence. Pet. App. A-19-A-27. *En banc* review by the lower court of appeals is not required for this Court to consider issues addressed and decided in the lower court's published opinion.

B. THE NINTH CIRCUIT HAS IMPROPERLY EXPANDED A DEFENDANT'S RIGHT TO ACCESS TO A COMPETENT PSYCHIATRIST UNDER THE NARROW CIRCUMSTANCES ESTABLISHED BY THIS COURT'S OPINION IN *AKE V. OKLAHOMA*, AND IN CONTRADICTION TO OTHER CIRCUIT COURTS' INTERPRETATIONS AND APPLICATIONS OF *AKE*, AND USED THAT EXPANSION TO IMPROPERLY GRANT HABEAS RELIEF ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Jones argues that the Ninth Circuit has not expanded this Court's decision in *Ake* and, further, that there is no real split in circuit court opinions interpreting *Ake*. However, as outlined in Petitioner's Petition for Certiorari, under AEDPA, a state

prisoner is not entitled to federal habeas relief with respect to any federal claim adjudicated on the merits in state court proceedings unless the state court adjudication (1) was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). (Petition for Certiorari, at 13.) The Federal law as determined by this Court relevant to the Ninth Circuit's determination that habeas relief was warranted is *Ake v. Oklahoma*, 470 U.S. 68 (1985).

In *Ake*, this Court applied a three-factor analysis to decide whether, and under what conditions, "the participation of a psychiatrist is important enough to the preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." 470 U.S. at 77. Those three factors are as follows: (1) the private interest that will be affected by the action of the State; (2) the governmental interest that will be affected if the safeguard is not provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Id.*

In *Ake*, where a capital defendant, whose sole defense at trial was insanity, was denied *any* access to a court-appointed psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition. This Court concluded:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum,

> assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. *This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.* Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83, emphasis added. The Ninth Circuit has ignored this language, expanding significantly on the right established by this Court in *Ake* to access to a competent psychiatrist:

> The right to psychiatric assistance does not mean the right to place the report of a "neutral" psychiatrist before the court; *rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate*—including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment.

Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990), emphasis added. The Ninth Circuit's expansion of the right to access to a competent psychiatrist when a defendant's mental condition is at issue into a blanket right to a *partisan* expert of a defendant's choosing and in unlimited capacity ignores this Court's three-part standard established in *Ake* for determining whether the State must provide access to the psychiatric assistance at issue. Moreover, as pointed out in Petitioner's

Petition for Certiorari, this expansion of *Ake* is contrary to other circuit court opinions. (Petition for Certiorari, at 15-16.)

Further, the Ninth Circuit has used this expanded *Ake* standard as a basis for improperly determining ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases—by determining that Jones was denied constitutionally effective assistance of counsel requiring relief in defiance of meritorious adjudication in valid state court proceedings, and a well-reasoned, factually supported decision by the district court. As this Court stated in *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), a lower court errs when it treats the ABA Guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply." 130 S.Ct. at 17, internal quotation and citation omitted.

The Ninth Circuit's conclusion that Jones's defense counsel was constitutionally ineffective—thus entitling Jones to habeas relief—because defense counsel properly relied on a court-appointed expert who actively participated in developing mitigation and defense strategy, rather than additionally retaining a partisan expert, is itself an unreasonable application of clearly established Federal law as determined by this Court, and this Court should grant the Petition for Writ of Certiorari in order to address it. *Ake* does not establish a mandatory right to a partisan expert, and Jones's counsel was *not* constitutionally ineffective for not retaining one under the facts and circumstances of this case.

II

THE NINTH CIRCUIT FAILED TO GIVE MANDATORY DEFERENCE TO STATE COURT PROCEEDINGS AS REQUIRED BY FEDERAL LAW.

Jones disputes Petitioner's contention that the Ninth Circuit has failed to give the high deference required for evaluating state court rulings pursuant to AEDPA, specifically 28 U.S.C. § 2254(d), and also criticizes Petitioner for quoting extensively from Judge Kozinski's dissent in *Pinholster v. Woodford*, 590 F.3d 651 (9th Cir. 2009). Notably, on June 14, 2010, this Court granted review of the Ninth Circuit's decision in *Pinholster*, making Judge Kozinski's analysis even more pertinent. Specifically referencing the instant case as just one example, Judge Kozinski references a pattern of Ninth Circuit review of state court capital convictions that fails to afford proper deference to the state court proceedings, and, further, establishes an improper standard that few state court convictions can survive. 590 F.3d at 685. As Judge Kozinski explains, the reasons behind the AEDPA deference to state court proceedings are many:

> When AEDPA governs, we are constrained by yet another measure of deference, one that we owe to the state courts which first examined and ruled on the issue. Deference in the IAC context is particularly appropriate because the state courts, and state supreme courts in particular, are most familiar with the type of inquiry we must undertake under *Strickland*. State court judges have an intimate familiarity with the local standards of practice and know

> far better than federal judges what could reasonably have been expected of competent counsel at the time and place of trial. State courts are also far more likely to understand the behavior of local juries, and thus can best figure out whether a hypothetical strategy, invented by habeas counsel years or decades after the trial, would have changed the outcome.

590 F.3d at 688. In the instant case, the state court resolution of Jones's post-conviction petition was made by the same judge who sentenced Jones—and who was thus "ideally situated" to evaluate Jones's ineffective assistance of counsel claim. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007). A review of the record makes clear that the Ninth Circuit improperly second guessed this process in direct violation of the mandates of the federal statutes and this Court's case law. *See generally, Van Hook*, 130 S.Ct. 13; *Wong v. Belmontes*, 130 S.Ct. 383 (2009); *Woodford v. Visciotti*, 537 U.S. 19 (2007); *Yarborough v. Alvarado*, 541 U.S. 542 (2002); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

This Court should grant review to correct the Ninth Circuit's erroneous and non-deferential conclusions, as well as the methods used to reach those conclusions. This includes the Ninth Circuit's disapproval of the district court "weigh[ing] the testimony of the experts against each other in order to determine who was the most credible"—precisely and necessarily the role of a district court judge conducting an evidentiary hearing on the issue of whether newly proffered expert testimony would have made a difference in the outcome in state court. Pet. App. A-28.

CONCLUSION

For these reasons, the State respectfully requests that this Court grant certiorari review.

Respectfully submitted

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